84-779 (1)

Office-Supreme Court, U.
FILED
OCT 25 1984
ALEXANDER L. STEVAS,
CLERK

No. A-196
IN THE SUPREME COURT OF THE UNITED STATES
1984 Term

Richard J. Lorette,

Plaintiff-Petitioner,

vs.

The United States,

Defendant-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR WRIT OF CERTIORARI

Attorney for Petitioner:
Dale C. Nathan
Nathan, Baska & Lerman, Ltd.
3435 Washington Drive
Suite 200
Eagan, Minnesota 55122
(612) 454-0505

Attorney for Respondent:
Lynn J. Bush
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Washington, D.C. 20530
(202) 724-7218

58 pp

QUESTION PRESENTED FOR REVIEW

Did the Federal Circuit Court of Appeals err in holding that petitioner was not entitled, on a basis of quantum meruit, to reasonable compensation and reimbursement of his costs in connection with services he provided to the respondent. Petitioner asserts the Federal Circuit Court of Appeals erred when it reasoned that in order to recover on a quantum meruit basis, a "contract of some sort" must exist and such contract must be made or ratified by an official of the Government having contracting authority. The Court found that no contract existed between petitioner and the respondent, implied-in-fact or otherwise, that petitioner did not deal with a Government official having authority to contract on behalf of the Government or to ratify an implied contract, and that petitioner may have derived significant professional

benefits from his service for the Government, which presumably was a form of compensation. The Court affirmed the Trial Court's ruling in substance that quantum meruit is no longer a basis for recovery in contract cases against the United States Government (the Trial Judge ruled that decisions allowing awards on quantum meruit are "questionable cases" were "very shaky" and were "oddities.") On that basis, the Court denied recovery to petitioner. Petitioner submits that the reasoning employed by Federal Circuit Court of Appeals is in error is in direct conflict with established case law cited by petitioner.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Richard J. Lorette (a private citizen) and respondent the United States are the only parties to this proceeding.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW . . . i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS. iii

TABLE OF AUTHORITIES iii

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS OF THE COURTS BELOW . . v

GROUNDS FOR JURISDICTION v

STATEMENT OF THE CASE:

Summary of Facts and Procedural History of the Litigation 1

The Basis for Federal Jurisdiction .4

ARGUMENT:

The Petitioner is Entitled to Recovery on a Quantum Meruit Basis . . . 5

Certiorari Should Be Granted . . . 15

CONCLUSION 17

TABLE OF AUTHORITIES

Blake Construction Company v. United States, 296 F.2d 393 (1961) . . . 5,6

Clark v. United States, 95 U.S. 539 (1877) 11

Coleman v. United States, 152 U.S. 96 (1894) 11

Johnston v. United States, 69 Ct.Cl.728 (1930) 6

L. Schepp Company v. United States, 61 Ct.Cl. 219 (1925). 8

Prestex, Inc. v. United States, 320 F.2d 367, 162 Ct.Cl. 620 (1963) 10

Salomon v. United States, 19 Wall.R. 17 (1973) 13

St. Louis Hay & Co. v. United States, 191 U.S. 159 13

United States v. Berdan Fire-Arms Manufacturing Co., 15 U.S. 552. . .14

United States v. Bethlehem Steel Company, 258 U.S. 321 (1922) . . . 14

United States v. New York and Porto Rico Steamship Company, 239 U.S. 88 (1915. 13

United States v. R.P. Andrews & Company, 207 U.S. 229 (1907) . . . 12

United States v. Socie'te' Anonyme, etc., 224 U.S. 309 14

Williams, et al v. United States, 130 Ct.Cl.435, 127 F.Supp. 617 (1955) 7

Yosemite Park and Curry Company v. United States, 217 Ct.Cl. 360 (1978) 8

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS OF THE COURTS BELOW

Richard J. Lorette v. United States, unpublished, United States Claims Court, No. 717-81-C, November 18, 1983.

Richard J. Lorette v. United States, unpublished, United States Court of Appeals for the Federal Circuit, No. 84-749, June 28, 1984.

GROUNDS FOR JURISDICTION

The judgment to be reviewed was issued by the Circuit Court of Appeals for the Federal Circuit under date of July 12, 1984, and was issued as mandate on July 28, 1984. An Application for Extension of Time In Which to Apply For A Writ Of Certiorari was filed with this Court on or about September 14, 1984 and an extension until October 26, 1984 was granted by Order Extending Time To File Petition For Writ of Certiorari dated September 20, 1984.

The statutory provision which confers jurisdiction upon this Court is 28 U.S.C. §2101.

STATEMENT OF THE CASE

Summary of Facts and Procedural History of Litigation

In March, 1978, petitioner, then a faculty member on the staff of the University of Southern California (hereinafter "USC"), was loaned to the Federal Acquisition Institute (hereinafter "FAI"), by USC, pursuant to Title IV of the Intergovernmental Personnel Agreement Act, to perform certain research services. Petitioner was never an employee of the FAI but remained on the payroll of USC. Pursuant to an Assignment Agreement executed by representatives of the FAI and USC, petitioner was loaned to the FAI for a period of one year and the FAI reimbursed USC for the services of petitioner for that one-year period.

In April, 1978, petitioner began performing services for the FAI. Petitioner was assigned the project of conducting a study of

the sixteen major federal administrative agencies to determine the effectiveness and usefulness of the Federal Government programs that are implemented in Government procurement actions. Petitioner was to prepare a final report at the conclusion of his research.

Circumstances not relevant to the issues herein prevented completion of a final report while petitioner was assigned to and working at the FAI.

Shortly before petitioner left the FAI in May, 1979, officials of the FAI asked petitioner to continue working on, complete and submit a final report summarizing the results of his work while on assignment to the FAI. These officials were or had been contracting officers and one of them, the Director of the FAI, was the individual who had signed Assignment Agreements with USC to contractually bind the FAI. There was no

discussion of the terms of the effort the FAI requested of petitioner. However, petitioner expected and understood that he would be paid for this additional effort.

After leaving the FAI, petitioner began work on the final report. Officials of the FAI often contacted petitioner to inquire about the status of the report and urged him to expedite completion and submission of the report. At no time prior to submitting his final report was petitioner asked to return any papers or documents to the FAI.

On approximately April 28, 1980, petitioner submitted his final report to the FAI, which final report consisted of approximately 950 pages. After receiving the report, the FAI copied, published and distributed portions of the report on several occasions, and used the report at various meetings.

After submitting his report, petitioner made several requests for reimbursement for

his effort and expense in preparing the final report but each such request was denied by the FAI. Thereafter, petitioner submitted his claim for compensation and demanded payment or a Contracting Officer's Final Decision. The FAI refused to issue a Contracting Officer's Final Decision or in any way recognize petitioner's claim. Petitioner then brought suit in the United States Court of Claims but the Court of Claims denied recovery to petitioner. The United States Circuit Court of Appeals for the Federal Circuit upheld the decision of the Court of Claims.

The Basis for Federal Jurisdiction

The basis for original federal jurisiction in this matter, specifically, the United States Court of Claims, is that the subject action was brought by petitioner against the United States of America.

ARGUMENT

The Petitioner is Entitled to Recovery On A Quantum Meruit Basis.

The doctrine of quantum meruit was succintly described in Blake Construction Company v. United States, 296 F.2d 393 (1961). In that case the United States sought to recover amounts allegedly found owing after renegotiation of the contract. The Court said:

> "If in fact the contract was made without authority then perhaps no contract exists but the contractor is nonetheless entitled to the reasonable value of the benefits conferred."

The FAI has never asserted that the final report prepared by petitioner was not valuable. In fact, the FAI recognzied the report as being highly significant and of substantial value and benefit. On many occasions, the FAI copied, published and

distributed portions of the report. Specifically, public use was made of the final report in that copies of the portions published were made available to several hundred attendees of the Ninth Annual DDD-FAI Procurement Research Symposium in June, 1980. Also, copies were distributed to the Civil Agency Acquisition Research Council (CAARC) and to the Interagency Working Committee. Thus, it is evident that, as in Blake Construction Company, supra, benefits were conferred to the FAI for which petitioner is entitled to reasonable compensation.

Many decisions were cited by petitioner to the Federal Circuit Court of Appeals in which recovery was allowed on a quantum meruit basis even though no Government official with contracting authority authorized or ratified the purported agreement at issue. For example, in Johnston v. United States, 69 Ct.Cl. 728 (1930), officials of the United

States asked the plaintiff to perform services for a shipbuilding contractor. The services were performed and some compensation was paid to the plaintiff by the shipbuilding contractor. The plaintiff filed suit against the United States for additional compensation. The Court found that the plaintiff did not have a contract with the United States but further found that an implied-in-fact contract did exist and, on that basis, inferred a promise to pay by the Government and awarded recovery to plaintiff.

In Williams d/b/a Williams Equipment Company v. United States, 130 Ct.Cl. 425, 125 F.Supp. 617 (1930), the Government refused to approve an arrangement between a contractor and an Air Force officer because the officer was not a contracting officer with full authority to bind the Government. The Court found that the contractor carried out his part of the agreement for which the Govern-

ment received benefit, and held that there then arose an implied contract under which the Government was obligated to pay the value of the services rendered.

In L. Schepp Company v. United States, 61 Ct.Cl 219 (1925), the plaintiff was asked to provide coconut shells to the Government. The plaintiff therein did, in fact, provide quantities of coconut shells. There was never a written contract between the plaintiff and the Government and it was found that the Government official who asked for the coconut shells had no authority to made a contract binding on the Government. Nonetheless, judgment was entered in favor of the plaintiff.

In Yosemite Park and Curry Company v. United States, 217 Ct.Cl. 360 (1978), the Court allowed recovery to the plaintiff on a contract the Government contended was invalid and unenforceable under Government procure-

ment law. In deciding in the plaintiff's favor the Court said:

> ". . . plaintiff should nevertheless be allowed to recover the reasonable value of the services it rendered to the Government on a quantum meruit theory. Ordinary principles of equity and justice, urges plaintiff, preclude the Government from retaining and accepting services and benefits while at the same time refusing to pay for them on the ground that the Agreement pursuant to which the benefits were conferred was invalid because it was unauthorized, did not follow proper form, or for some other reason.
>
> * * *
>
> ". . . We hold that plaintiff should be entitled to recover the reasonable value of the services which it rendered to the Government and for which the Government accepted full benefits for over four years and therefore, remand this case to the Trial Division for a determination of the

reasonable value of those services."

Finally, in Prestex, Inc. v. United States, 320 F.2d 367, 162 Ct.Cl. 620 (1963), the Court ruled:

> "Even though a contract be unenforceable against the Government, because not properly advertised, not authorized, or for some other reason, it is only fair and just that the Government pay for goods delivered or services rendered and accepted under it.
>
> * * *
>
> "No one would deny that ordinary principles of equity and justice preclude the United States from retaining the services, materials and benefits and at the same time refusing to pay for them on the ground that the contracting officer's promise was unauthorized, or unenforceable for some other reason. However, the basic fact of legal significance charging the Government with liability in these situations is its retention of benefits in the form of goods or

services."

The Supreme Court of the United States has issued decisions similar to the of the Court of Claims. For example, in Clark v. United States, 95 U.S. 539 (1877), a steamer was lost while being operated by the Army pursuant to an unenforceable parol contract with the owner. The owner sued for the loss and the reasonable value of the use of the vessel for eight days. The Court said:

> "We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a quantum meruit."

In Coleman v. United States, 152 U.S. 96 (1894) the plaintiffs contended that the facts disclosed constituted an implied

contract on the part of the Government to pay plaintiffs the value of the services rendered. The Supreme Court, however, found that an express understanding existed between the parties whereby plaintiffs were to receive no compensation from the Government. The Court observed:

> "Assuredly there may be a state of facts from which an implied contract or promise to pay for services rendered may be justly inferred, * * *. But we think that a promise to pay for services can only be implied when the court can see that they were rendered in such circumstances as authorized the party performing to entertain a reasonable expectation of their payment by the party benefitted."

In United States v. R.P. Andrews & Company, 207 U.S. 229 (1907), the Supreme Court considered a statute then in effect which required all contracts made on behalf of the

Government by the Secretary of War, Secretary of Navy, or their officers or agents, be reduced to writing and signed by the contracting officer. The Court said:

> "But is settled that the invalidity of a contract because of a noncompliance with the section referred to is immaterial after the contract has been performed. St. Louis Hay & Co. v. United States, 191 U.S. 159, 163."

The same statute was considered in Salomon v. United States, 19 Wall. R. 17 (1873), where the Supreme Court held that the statute "is not infringed by the proper officer having charge of such matter accepting delivery of such supplies ...nor is a verbal agreement to extend the time of performance invalid." (See also United States v. New York and Porto Rico Steamship Company, 239 U.S. 88 (1915).

Finally, the Supreme Court considered a

suit by a steel company to recover royalties for the use by the Government of a patented invention owned by the company in United States v. Bethlehem Steel Company, 258 U.S. 321 (1922). The Court stated:

> "'from the cases heretofore adjudicated upoon similar principles it may be solely asserted that where the Government uses a patented invention with the consent and express permission of the owner and does not repudiate the title of such owner, and implied contract to pay a reasonable compensation for such usage arises'. United States v. Berdan Fire-Arms Manufacturing Co., 156 U.S. 552, and United States v. Socie'te' Anonyme, etc., U.S. 309, 320."

Although no patent exists in the instant case, petitioner submits that the above-stated principle is nonetheless applicable.

Each of the above cases is a case in which payment on quantum meruit basis was permitted where the Government agent was lacking

authority to contract in the name of the Government, and many more decisions standing for the same premise were cited to the Federal Circuit Court of Appeals. Recovery in such cases is predicated on the theory that it would be unfair for the Government to have the benefit of the contractor's goods or services without recompense.

Thus, the decision of the court below in this matter denying petitioner recovery on the basis that no contract authorized or ratified by Government officials with contracting authority existed, appears to contradict the well-established line of authority, endorsed by the Supreme Court of the United States, as described above.

Certiorari Should Be Granted.

It is respectfully submitted that this Court should not allow to stand the ruling of the lower court in this case, which ruling is in direct conflict with a precedent which has

developed to protect unsuspecting individuals and firms that provide goods or services to the United States Government.

In light of the conflict between the decision below by the Federal Circuit Court of Appeals and the consistent holdings in the past by various federal courts, including the Supreme Court of the United States, as described above, it is respectfully submitted that the failure to accord immediate review of the decision below might seriously erode the federal policy to the effect that a contractor who provides the Government with goods or services from which the Government receives benefit should be compensated reasonably for such goods or services.

Thus, if the decision below is allowed to stand unaddressed by this Court, other courts will be free to, in effect, dispose of the doctrine of quantum meruit, thereby seriously prejudicing the individuals and firms that

contract with the Government and creating the potential for increased distrust and difficulty in contracting with the Federal Government.

CONCLUSION

As the cases cited herein and the multitude of similar cases illustrate, recovery on a quantum meruit basis is permitted by a contractor even when the Government employee who ordered products or services lacked authority to contractually bind the Government or where there was no contract at all. Such a precedent eliminates, or attempts to eliminate, the exploitation of unsuspecting individuals and firms providing the Government with valuable goods or services.

In this case, the court below has refused and failed to properly apply the doctrine of quantum meruit and, as a result, petitioner, who provided a service to the United States

Government recognized by the Government as valuable and beneficial, has been denied compensation to which he is most certainly entitled. Petitioner respectfully requests that to avoid further inequity and to preserve the continuing application of the doctrine of quantum meruit, the Supreme Court grant this Petition for Writ of Certiorari.

Dated: October 24, 1984.

NATHAN, BASKA & LERMAN, LTD.

Dale C. Nathan

Dale C. Nathan
Attorney for Petitioner
3435 Washington Drive, Suite 200
Eagan, Minnesota 55122
(612) 454-0505

INDEX TO APPENDIX

Decision of the United States Court of Appeals for the Federal Circuit, dated June 28, 1984 . . . . . A.1

Judgment of the United States Court of Appeals for the Federal Circuit, dated July 12, 1984, and issued as mandate July 28, 1984 . . . . . A.11

Decision of the United States Court of Claims contained in pages 451 - 453 of the transcript of the proceeding before that Court A.12

Order of the United States Court of Claims dated November 17, 1983 . . . . . A.29

Judgment of the United States Court of Claims filed November 18, 1983 . . . . . A.30

No. A-196
IN THE SUPREME COURT OF THE UNITED STATES
1984 Term

Richard J. Lorette,

Plaintiff-Petitioner,

vs.

The United States,

Defendant-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

AFFIDAVIT OF SERVICE

Attorney for Petitioner:
Dale C. Nathan
Nathan, Baska & Lerman, Ltd.
3435 Washington Drive, Suite 200
Eagan, Minnesota 55122
(612) 454-0505

Attorney for Respondent:
Lynn J. Bush
U.S. Department of Justice
Civil Division
Commerical Litigation Branch
Washington, D.C. 20530
(202) 724-7218

STATE OF MINNESOTA)
)ss.
COUNTY OF DAKOTA)

Dale C. Nathan, being first duly sworn, upon oath, deposes and says that he offers this Affidavit of Service in accordance with Rule 28 of the Rules of the Supreme Court of the United States; that he is an attorney at law with offices at 3435 Washington Drive, Suite 200, Eagan, Minnesota; that on the 24th day of October, 1984, he served the attached Petition for Writ of Certiorari on the following person by placing a copy thereof in an envelope properly addressed as follows:

Lynn J. Bush
Civil Division
U.S. Department of Justice
550 - 11th Street NW, Suite 576
Washington, D.C.20530

which address is the last address of said Lynn J. Bush known to him, and the envelope with postage prepaid was deposited by him in the U.S. Mail at Eagan, Minnesota for delivery by the U.S. Post Office Department

as directed by said envelope.

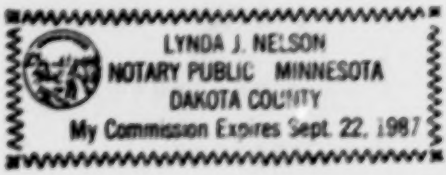
Dale C. Nathan

Dale C. Nathan

Subscribed and sworn to before me

this 24th day of October, 1984.

Notary Public



Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RICHARD J. LORETTE,	)	
	)	
Appellant,	)	
	)	
v.	)	Appeal No. 84-749
	)	
THE UNITED STATES,	)	
	)	
Appellee.	)	

DECIDED: June 28, 1984

Before RICH, NIES, and NEWMAN, Circuit Judges.

NEWMAN, Circuit Judge.

DECISION

The judgment of the United States Claims Court filed November 18, 1983, holding that appellant is not entitled to compensation for certain services voluntarily performed after

the end of appellant's contractual term of employment, is affirmed.

OPINION

Appellant Richard J. Lorette instituted this action to recover the reasonable value of his services for the completion of a government report on civilian agency acquisition research needs. While employed by the University of Southern California ("USC"), Dr. Lorette was detailed to the Federal Acquisition Institute ("FAI"), an agent of the appellee, pursuant to the provisions of Title IV of the Intergovernmental Personnel Act of 1970, 5 U.S.C. §§3371-3376 (1976). Under the terms of the contract between USC and FAI, Dr. Lorette held a temporary, one-year position of Procurement Analyst at FAI. Lorette's assignment was to conduct a "user needs survey with the 22 member agencies of the FPI [Federal Procurement Institute]."

At the time the contract expired, Dr. Lorette had completed the survey and several interim summaries but not the final report. At his request USC and FAI entered into a written extension of the contract for twenty days, until April 30, 1979, so that Lorette could finish the report. By the end of this extension he had not produced the final report. After unsuccessfully seeking a further three-month extension Dr. Lorette left FAI, taking his research notes.

The reasons why Lorette took his research notes, and the ownership of these notes and their contents, were subject to conflicting argument below and on this appeal. Based on documentary evidence and uncontroverted testimony, the Claims Court found that the notes were government property, that Dr. Lorette refused to comply with requests for the research notes, that he was concerned that FAI would abandon the project after his

departure,[1] that his taking of the research notes was tolerated by his supervisors at FAI in view of his stated intention to complete the final report, and that payment for this work was not discussed.

The FAI received Dr. Lorette's final report on April 30, 1980. By letter dated April 29, 1980, Lorette sent the FAI a "statement of charges" in the amount of $8,835.82, noting that he had done the work

---

1 The court noted the existence of evidence indicating that in the ensuing year Dr. Lorette derived significant professional benefits from the possession of those materials, stating:

> He attended conferences, symposium, he was quoted in Government Executive magazine and it was quite clear that had he not had those materials in his possession he would have been unable to give the reports and the presentations that he did. That further suggests that indeed he had an interest in the materials that transcended whatever obligation he had to the Government and that is purely providing a study for the Government's use as a subject of intellectual and academic interest to him.

"even without a contract or any other kind of verbal agreement as to how soon the report was to be completed or what the rate of reimbursement (if any) was to be." When FAI declined to pay this amount, Lorette's attorney submitted a claim for payment of $31,385.82, followed by suit in the Claims Court.

Following three days of trial, the Claims Court found that there was no agreement, express or implied-in-fact, that FAI would compensate Dr. Lorette for completion of the final report. The court found that Lorette did not deal with any person who had governmental authority either to authorize the additional work or to ratify an implied agreement after the government received the final report. The Claims Court concluded that Lorette completed the report at his own risk and expense. Absent the existence of a "contract of some sort" with the traditional

indicia of consideration, authority, and a meeting of the minds, it held that Lorette was not entitled to quantum meruit relief against the Government. We hold that Dr. Lorette has not met his burden of persuasion on this appeal that the findings of the Claims Court are clearly erroneous or that the Claims Court incorrectly applied the law to these facts.

The jurisdiction of this United States Claims Court, insofar as it is relevant to this appeal, is confined to a claim against the United States founded upon "any express or impled contract with the United States." 28 U.S.C. §1491(a)(1) (1982). Appellant does not now insist on the existence of an express contract with the Government; rather, Dr. Lorette maintains that he expected and understood that he would be paid for this additional work and that he is entitled to recover compensation on a quantum meruit

basis because the government has benefited from its receipt and use of the finished report. The cases relied on by appellant, however, distinguish between an action against the United States based on an implied-in-fact contract and one based upon a contract implied-in-law, and the heavy weight of the authority is contrary to appellant's position.

An implied-in-law or quasi contract is not a true contract but rather an obligation imposed by law to do justice even though no promise was ever made or intended. See Baltimore & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923); 17 C.J.S. Contracts §6 (1963). The Claims Court does not have jurisdiction under the Tucker Act for claims based on implied-in-law contracts. Merritt v. United States, 267 U.S. 338, 341 (1925); Sutton v. United States, 256 U.S. 574, 581 (1921). Thus, absent an express or implied-

in-fact agreement between the parties, appellant cannot recover the reasonable value of his services on an unjust enrichment theory. Fincke v. United States, 675 F.2d 289, 296-97 (Ct. Cl. 1982); United States Steel Corp. v. United States, 536 F.2d 921, 927 (Ct. Cl. 1976). We find no error in the Claims Court's holding that there must be a "contract of some sort" in order for the appellant to be entitled to quantum meruit relief.

As recognized by the Claims Court, an exception exists if it is shown that the unauthorized work which conferred a benefit on the Government was subsequently ratified by an official with contracting authority. Prestex Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963); New York Mail and Newspaper Transp. Co. v. United States, 139 Ct. Cl. 751, cert. denied, 355 U.S. 904 (1957). The Claims Court specifically found that since

the people with whom appellant dealt (Mr. Bennett, Mr. Hunter, and Mr. Spagnola)[2] each lacked authority to contract with the appellant for the post-employment final report, they did not have the power to ratify appellant's subsequent actions.

Nor can appellant prevail on an implied-in-fact contract theory. An implied-in-fact contract requires a meeting of the minds which is inferred from the conduct of the parties, in light of the surrounding circumstances, to show their tacit understanding or agreement. Baltimore & Ohio R.R. v. United States, 261 U.S. at 597; Algonac Mfg. Co. v.

---

2 The fact that Messers. Bennett and Hunter may have had the authority to execute assignment agreements between USC and FAI is of little assistance to the appellant. Such authority is not evidence of a general contracting authority but of a limited grant of statutory authority, provided under Title IV of the Intergovernment Personnel Act of 1970, to contract with institutions of higher education, and state or local governments. 5 U.S.C. §3372 (1976).

United States, 428 F.2d 1241, 1255 (Ct. Cl. 1970). The Claims Court found no evidence that FAI officials intended to compensate the appellant for his additional work, and suggested that Dr. Lorette may have believed that "generosity might prevail" and that the FAI would be willing to reimburse him for the value of his services after it received the final report. The mere expectation of payment for work performed does not create an implied-in-fact contract, even when the product of such labor is used by the Government. Chesapeake & Potomac Telephone Co. v. United States, 281 U.S. 385, 388 (1930); H. Herfurth, Jr., Inc. v. United States, 89 Ct. Cl. 122, 127 (1939). We agree with the Claims Court finding that there was no implied-in-fact contract between Dr. Lorette and the United States.

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT

RICHARD J. LORETTE,
Appellant,

No. 84-749
717-81C

v.

THE UNITED STATES,
Appellee.

JUDGMENT

ON APPEAL from the U.S. Claims Court

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED.

DATED: July 12, 1984

ENTERED BY ORDER OF THE COURT
George E. Hutchinson, Clerk

/s/ George E. Hutchinson
Clerk

ISSUED AS MANDATE: July 28, 1984

* * *

THE COURT: Okay.

Let's get a couple of things out of the way that might have been unclear in the beginning but I don't think are unclear now. First of all, the question as to Dr. Lorette's status. It (page 439) is clear that Dr. Lorette did not have a contract with for the original year, there was no contract with Dr. Lorette to provide any services or a product. Whether a contract existed was with the University of Southern California, so whatever obligation might have existed by virture of that contract or anything of that sort was an obligation of the University of Southern California which was the original contracting party.

Dr. Lorette was an employee, and there are many nuances of employment. I am not sure he

was an employee and he was employed in the GS-15, 14 level to do some research. The Position Description, of course, did specify that some sort of manuscript was to result from that research. I don't think there is any doubt about that but it is just like with any other Position Description in the Government, it certainly does not create an obligation on the part of an employee to fulfill a task. It simply means that the employee is obligated to work with the task and if the performance is unsatisfactory he may be discharged or I support in this kind of arrangement contract with the university would be terminated but basically the remedy moving with the remedy.

So at the time Dr. Lorette finished his year plus a 20 day extension it is likely he didn't have an obligation to provide the report. USC might, I don't think it did but it really does not matter. It is clear Dr.

Lorette didn't have (page 440) any such obligation. On the other hand, Dr. Lorette did not have an obligation to leave the fruits of his labors behind. That is what is the obligiation of any employee of the Government and any employee anywhere, is that one does not take with one's self the fruit of the labors for which one has been paid.

Dr. Lorette was paid for nothing else than to go out and do the research, to talk to people and to gather it up and to go as far as putting it together in a report as it was possible for him to do. But those materials were being gathered so long as he worked for the United States Government for the benefit of the United States Government, not for his own personal benefit.

Furthermore, Dr. Lorette had other obligations as an employee, among them being to follow directions of his supervisors. It is quite obvious that when the supervisors

changed that personality conflicts arose between Dr. Lorette and Mr. Hunter and for reasons which are not entirely clear on the record, and I don't wnat to find fault with either side, they probably did not get along. The fact that Dr. Lorette refused what appears to be a fairly clear order or fairly justified order to release the names of the people he had spoken to suggested that he had taken interest in his research that went beyond the professional or beyond the detached professional, that he really made a personal interest in this research and he has some very strong feelings on the subject.

(page 441) No no one has pointed out any confidences, any privilege or any prior commitment that might have been entered with either Mr. Hunter or Dr. Bennett that would have allowed Dr. Lorette to keep those names secret. The basic principle is that there are no secrets from one's supervisors other

than such as by statute or special arrangement or in very rare circumstances. No blame attaches to it but it just is very strongly on this record that his interest in this project was quite strong, that it went far beyond the simply detached intellectual research interest, that he had a lot of himself invested in it and that is good.

I think those who perform research should be interested in their work. There is support fully explicit and I find uncontroverted testimony of Mr. Spagnola; namely, that as Dr. Lorette was preparing to leave that Mr. Spagnola asked him to leave the materials. Dr. Lorette said no, he believed the materials would be badly treated, that Mr. Hunter had no interest in this survey. Mr. Spagnola said that he himself didn't have the kind of job as Dr. Lorette would want to have done. That testimony is simply uncontroverted.

Dr. Lorette was very vague about the key conversation as to which he was just remarkably vague. He could not even remember the specific place where the conversation took place and could only remember the very, very barest outlines. The (page 442) only thing he remembers specifically is that he promised a report but he didn't say when. It is fully consistent with Spagnola's testimony who said that again the conversation, the compromise was okay, don't take the materials, but at least if you don't return the materials for us to do the report, you do one. What it suggests to me is that Dr. Lorette felt at that point that he would rather have the report done than have the research go to waste or have it badly treated by somebody else or have it misconstrued.

Now is the year that ensued there is evidence that Dr. Lorette derived significant professional benefits from the possession of

those materials. He attended conferences, symposium, he was quoted in Government Executive magazine and it is quite clear that had he not had those materials in his possession he would have been unable to give the reports and the presentations that he did. That further suggests that indeed he had an interest in the materials that transcended whatever obligation he had to the Government and that is purely providing a study for the Government's use as a subject of intellectual and academic interest to him.

The testimony is quite clear that Dr. Lorette was never promised any money for providing the report, indeed there was a letter that says, "I have not discussed with anybody what amount, if any -- what amount, if any -- I will be paid." I can probably just pick it out of here. This is Defendant's Exhibit (page 443) No. 21. This is the April 29, 1980, letter where even without

a contract or any other kind of verbal agreement as to how soon the report was to be completed or what the rate of reimbursement, if any, was to be. This quite clearly establishes that Dr. Lorette contemplated there might be no payment at all for the report. To be sure, he might have felt that generosity might prevail and that he might be reimbursed but it is just uncontrovertable that whatever feelings he had about reimbursement were bare expectancies and that he entertained the possiblity, and the strong possibility, that indeed no payment would be made.

There was no promise to contract and no one there who could ratify any contract because none of the witnesses who testified had contracting authority. In order to have an implied contract there have to be the normal components of a contract consideration, there has to be an agreement and action

consistent with that agreement plus -- this is very important -- there has to be a knowing ratification by somebody who actually has authority to contract and there is no law contrary to that -- certainly no law in this circuit contrary to that.

In this case I find there was a failure to live up to his obligation. Dr. Lorette may not have had an obligation to prepare the report to begin with but at the moment when he refused to return or to leave behind him the property of the United States Government, basically a bargain was created between himself and Mr. Spagnola. I think it was generous of (page 444) Mr. Spagnola to allow him to take Government property and probably was imprudent for him to do so but if indeed in exchange for him to take that property Dr. Lorette basically agreed to file a report, it was a quid pro quo. Indeed it was more than a quid pro quo, it was the only materials on

which Dr. Lorette would provide anything under the findings that I have made for the year's salary that he had been paid.

Basically as I read the statement of Dr. Lorette, it was that you can have the report or you can have nothing, you can't have the notes. I think that it is very important so I find that that aspect of that contract was lacking. Then there was no one who at least on the Government side it seems to me acted inconsistent with the notion that it be the contract in force. Money was never discussed. It was quite clear Mr. Hunter never intended Dr. Lorette be paid, even Mr. Spagnola who it is quite clear is Dr. Lorette's friend did not make any adequate presentation that he thought he had agreed to pay any money.

And finally, even if all of these people had agreed, they did not have contracting authority. There has to be somebody with

authority to bind the Government, to ratify such an informal arrangement to make an implied contract. And in this case apparently the contracting authority existed with somebody outside the agency, Federal Acquisition Institute, and not one person has been brought forward who had contracting authority that testified or that some other way was shown that that (page 445) question had known about the contract, had known of the benefits referring to the Government and that money was expected to be paid for it and such question is ratified or permitted the continued acceptance of the benefits within the understanding that money would have to be paid for it. So several elements that were implied in the contract are missing and I therefore rule in favor of the Defendant and I will have the case dismissed.

* * *

(page 446) MR. NATHAN: Your Honor, there

is one concern that Plaintiff has with respect to the findings that the Court has just discussed at this point. The Court seems to be saying, as we hear it, that all of the work that Plaintiff did was taken with him. Plaintiff believes that the evidence will not reflect that, that upon examination of the evidence and of the testimony that the Court would find that all that Plaintiff took with him were handwritten notes and that in fact all of the results of his work had been left with the Defendant in the form of interim summaries that he had prepared for each agency as he completed the work for each agency and all that remained in terms of summarizing that data was the two or three additional interim summaries which in fact the Plaintiff completed and sent in. Perhaps the Court will recall that testimony.

THE COURT: I do recall the testimony. I also recall very clearly Mr. Spagnola's

testimony where he said, "I asked (page 447) him to leave the materials and he said no," and I am now asked to second guess as to what it is that was in there. I believe when Mr. Spagnola stated that indeed there were materials, I don't know enough about research to know what importance handwritten notes have or whether the summaries with other handwritten notes have any value at all. We have one witness who said you have to have the underlying data, you cannot simply rely on the summary report. I have no way of knowing what value the handwritten notes have.

I do recall very well Dr. Lorette's statement that indeed there was some summary report that was sent to various places that is significantly different than having all the materials together and having to put together with whatever underlying notes, questionnaire -- in other words, I mean the

whole package -- and I just am unable to conclude on this record that handwritten notes were without value or there would have been evidence Dr. Lorette was justified in taking them with him.

Mr. Spagnola was obviously a friendly witness to Dr. Lorette, he was put on by the Plaintiff and he did his best to help him which I think that is very good, that he spoke some pretty damning words when he said he would not return the materials. Obviously Spagnola was the Chief of Research and therefore he would be in the best position to know what, if anything, or what was left would have been of value to the Institute and he felt the materials ought to go out. I am not (page 448) going to second guess that.

So, yes, I do recall and I do find. If you wish me to find instead there was some copies of some report in some agencies, but I also find that there was not enough; that the

Chief of Research, Acting Assistant Director or Administrator for Research had asked for the package and in his judgment the package is what was important, it was denied and a report was given as a substitute. I am unimpressed by the statement that so many materials were left behind.

* * *

(page 451) MR. NATHAN: Your Honor, may I inquire with respect to the decisions that the Court referred to. Would I be correct that the Court has had the opportunity to read the principal decisions referred to?

THE COURT: Yes, I have read them. I think they are distinguishable. I think in those cases there was a ratification of some sort from our authority, that I think those are questionable cases in any case and I think it is very clear that the quantum meruit -- what the other thing is called is a very shaky feeling and I think the cases are

pointed out with the exceptions of the oddities and they are undistinguishable. The Johnston case was full knowledge by the board which are the board. This was going on, there was an indication in that sense. Courts use quantum meruit rather loosely, it does not always mean what it says. I think the worse cases say the law as well as anything and I have looked at them. I looked at the stack of opinions yeah high on this record. I simply can't buy the contract.

MR. NATHAN: May I ask, is it the Court's conclusion then that there cannot be recovery unless there is a finding of (page 452) a contract of some sort?

THE COURT: Yes, I think there has to be a contract of some sort. I think there has to be a contract of some sort and I think this time this case, now the contract for two reasons. There was no agreement for a contract and also there was consideration. I

think it is clear, as anybody can go on on this record, that Dr. Lorette offered a report in exchange for being permitted to take the notes with him. In fact, I think that is the way of putting it. He said, I am not going to leave the notes and the report is all you are going to get, and since he owed the notes he was required to leave them behind.

That was the consideration for permitting him to do that. I still think he owes the notes but those things are still United States Government property and should be treated as such.

IN THE UNITED STATES CLAIMS COURT
FILED NOV 17 1983

* * * * * * * * * * * * * * * * *

RICHARD J. LORETTE,

Plaintiff,

v. No. 717-81C

THE UNITED STATES,

Defendant.

* * * * * * * * * * * * * * * * *

ORDER

For the reasons stated on the record immediately following the trial on November 17, 1983, plaintiff is not entitled to recover. The clerk is directed to dismiss the complaint with costs to the prevailing party.

November 17, 1983.

/s/ Alex Kozinski
ALEX KOZINSKI
Chief Judge

mkb

IN THE UNITED STATES CLAIMS COURT

No. 717-81 C

RICHARD J. LORETTE

JUDGMENT

v.

FILED NOV 18 1983

THE UNITED STATES

Pursuant to the order of November 17, 1983, it was held that plaintiff is not entitled to recover with the complaint to be dismissed

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed, with costs to the prevailing party.

Frank T. Peartree

Clerk of Court

NOV 18 1983 By: /s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see FRAP 4(a)